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IN THE UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

In re:

TULARE LOCAL HEALTHCARE DISTRICT, dba Tulare Regional Medical Center,

Debtor.

Tax ID #: 94-6002897
Address: 869 N. Cherry Street
Tulare, California 93274

CASE NO. 17-13797

DC No.: WW-41

Chapter 9

Date: August 2, 2018

Time: 9:30 a.m.

Dept.: B

Place: 2500 Tulare Street
Fresno, California 93721

Courtroom 13
July 11, 2013

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1 **GE HFS, LLC'S OBJECTION TO (I) PROPOSED ASSUMPTION OR**
2 **ASSUMPTION AND ASSIGNMENT OF LEASES, AND (II) CURE**
3 **OBLIGATIONS WITH RESPECT THERETO PURSUANT TO NOTICE TO**
4 **CONTRACT AND LEASE PARTIES OF DESIGNATION OF CONTRACTS**
5 **AND LEASES TO BE ASSUMED AND ASSIGNED PURSUANT TO**
6 **MOTION FOR AUTHORITY TO ENTER INTO TRANSACTION INCLUDING**
7 **BORROWING FUNDS, SALES OF PERSONAL PROPERTY AND PROVIDING**
8 **SECURITY, ASSUMPTION AND ASSIGNMENT OF CONTRACTS AND**
9 **LEASES AND FOR AUTHORITY TO LEASE REAL PROPERTY**
10 **PURSUANT TO 11 U.S.C. SECTIONS 105, 362, 364, 365, 901 AND 922**

7 GE HFS, LLC ("GE HFS"), a lessor and party-in-interest in the above-captioned
8 bankruptcy cases, by and through its undersigned counsel, hereby objects to (i) the proposed
9 assumption or assumption and assignment of GE HFS's Master Lease (as hereinafter defined),
10 and (ii) the cure amount due with respect to the Master Lease, all as more particularly set forth
11 herein. In support of this Objection, GE HFS respectfully states the following:

12 **I. BACKGROUND FACTS**

13 **A. Master Lease and Prepetition Defaults.**

14 1. Prior to the filing of the subject chapter 9 bankruptcy case, GE HFS and Tulare
15 Local Health Care District ("Debtor") entered into that certain Master Lease Agreement dated as
16 of November 16, 2016 (all other exhibits, attachments, addenda, amendments and modifications
17 thereto, the "MLA"), and the following Equipment Schedules thereto: (a) that certain Equipment
18 Schedule dated as of November 16, 2016 (the "9892489 Schedule"), identified as Internal
19 Contract Ref. # 9892489001; (b) that certain Equipment Schedule dated as of November 16, 2016
20 (the "9892228 Schedule"), identified as Internal Contract Ref. # 9892228001); (c) that certain
21 Equipment Schedule dated as of November 18, 2016 (the "9892587 Schedule"), identified as
22 Internal Contract Ref. # 8982587001; and (d) that certain Equipment Schedule dated as of
23 January 3, 2017 (the "9899485 Schedule"), identified as Internal Contract Ref. # 9899485001.
24 The MLA, the 9892489 Schedule, the 9892228 Schedule, the 9892587 Schedule, the 9899485
25 Schedule and all other exhibits, attachments, addenda, amendments and modifications thereto are,
26 collectively, the "Master Lease." A true and correct copy of the Master Lease is included as
27 **Exhibit A** to the Declaration of Amy Wall (the "Wall Declaration") in support of, and filed
28 concurrently with, this Objection and is incorporated herein by this reference.

1 2. Through the Master Lease, GE HFS leases certain medical equipment owned by
2 GE HFS to Debtor, including (a) (i) one (1) GE Healthcare Dash 5000 v6 and accessories, and
3 (ii) one (1) GE Healthcare INW Networking 696, each pursuant to the 9892489 Schedule; (b) one
4 (1) GE Healthcare Maclab IT696R2 system and accessories, pursuant to the 9892228 Schedule;
5 (c) (i) one (1) ACIST Medical Systems Inc. miscellaneous equipment, (ii) two (2) Arrow
6 Interventional Inc. AutoCAT 2 Wave systems and accessories, (iii) four (4) CVIS RVASF
7 Greenlite Aprons (3 female, 1 male), and (iv) Accriva Diagnostics Activated Clotting Time
8 Analyzer, each pursuant to the 9892587 Schedule; and (d) one (1) Leica M822 F40 Ultimate Red
9 Reflex Ophthalmic Surgical Microscope, pursuant to the 9899485 Schedule (collectively, the
10 “Leased Equipment”). *See* Wall Declaration, ¶ 7 and Ex. A, pp. 7, 10, 16, and 17.

11 3. Debtor repeatedly defaulted under the Master Lease, *inter alia*, prior to
12 commencing the above-captioned chapter 9 bankruptcy case by failing and refusing to pay the
13 rental installments and other sums required to be paid thereunder. *See* Wall Declaration, ¶ 8 and
14 Ex. A., p. 2, § 10(a)(i). After GE HFS provided multiple notices of such defaults to Debtor, GE
15 HFS, in accordance with the terms of the Master Lease, declared all rental installments and other
16 sums for the balance of the term of the Master Lease to be immediately due and payable. *See*
17 Wall Declaration, ¶ 9 and Ex. A., p. 2, § 10(b)(i). Despite such acceleration of all amounts under
18 the Master Lease, Debtor continued in its failure and refusal to remit any sums due thereunder.
19 Wall Declaration, ¶ 9.

20 **B. Debtor’s Bankruptcy Case.**

21 4. On or about September 30, 2017 (the “Petition Date”), Debtor filed its voluntary
22 petition under chapter 9 of 11 U.S.C. §§ 101, *et seq.* (the “Bankruptcy Code”).

23 5. The Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1334. This
24 matter is a core proceeding under 28 U.S.C. § 157(b)(2) and venue is proper before this Court
25 pursuant to 28 U.S.C. §§ 1408 and 1409.

26 6. From and after the Petition Date, Debtor has persisted in its prepetition conduct by
27 failing and refusing to remit to GE HFS any amounts outstanding under the Master Lease. *See*
28 Wall Declaration ¶ 10. Such defaults continue as of the date hereof. *Id.*

C. The Potential Assumption and Assignment of the Master Lease.

7. On or about July 20, 2018, Debtor filed, *inter alia*, (a) that certain *Debtor's Motion for Authority to Enter Into Transaction Including Borrowing Funds, Sales of Personal Property and Providing Security, Assumption and Assignment of Contracts and Leases and for Authority to Lease Real Property Pursuant to 11 U.S.C. Section 105, 362, 364, 365, 901 and 922* [Docket No. 603] (the “Motion”), (b) that certain *Notice to Contract and Lease Parties of Designation of Contracts and Leases to be Assumed and Assigned Pursuant to Motion for Authority to Enter Into Transaction Including Borrowing Funds, Sales of Personal Property and Providing Security, Assumption and Assignment of Contracts and Leases and for Authority to Lease Real Property Pursuant to 11 U.S.C. Sections 105, 362, 364, 365, 901 and 922* [Docket No. 608] (the “Notice”), and (c) that certain *Declaration of Teresa Jacques in Support of Motion for Authority to Enter Into Transaction Including Borrowing Funds, Sales of Personal Property and Providing Security, Assumption and Assignment of Contracts and Leases and for Authority to Lease Real Property Pursuant to 11 U.S.C. §§105, 362, 364, 365, 901 and 922* [Docket No. 607] (the “Declaration”).

8. Pursuant to the Motion, the Debtor seeks approval from this Court to enter into certain loan, management, lease, transfer, and sale transactions with Adventist Health System/West, doing business as Adventist Health (“AHSW”) and/or Adventist Health Tulare (“AHT”), including the assumption and assignment of certain executory contracts and unexpired leases pursuant to section 365 of the Bankruptcy Code and in connection therewith, the fixing of amounts required to cure defaults under such assumed and assigned contracts and leases.

9. Attached to the Declaration is a list of contracts and leases to be assumed and assigned to AHSW or AHT as part of the transactions that are the subject of the Motion and the Debtor's proposed cure amount to be paid in connection with such assumption and assignment.

10. Pursuant to the exhibit attached to the Declaration, it appears that the Debtor asserts that \$0.00 is the required amount to cure all defaults under the Master Lease. See Declaration, Ex. A., p. 3, ln. 106.

II. OBJECTION

A. The Master Lease May Only be Assumed or Assumed and Assigned in its Entirety.

1 11. It is well-established that under section 365 of the Bankruptcy Code, a debtor that
2 seeks to assume or assume and assign a lease or other executory contract must either assume (or
3 assume and assign) the entire contract, *cum onere*, or reject the entire contract, shedding all
4 obligations as well as benefits. *See e.g.* *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. 513, 531
5 (1984) (debtor assumes executory contract *cum onere* if electing to assume contract); *see also, In*
6 *re National Gypsum Co.*, 208 F.3d 498, 506 (5th Cir. 2000) (when debtor assumes executory
7 contract, it must assume entire contract, *cum onere*, accepting both the obligations and the
8 benefits exactly as they exist); *In re City of Vallejo*, 403 B.R. 72, 76 (Bankr. E.D. Cal. 2009)
9 (recognizing that section 365 of the Bankruptcy Code applies to chapter 9 cases and such chapter
10 debtor may use section 365 of the Bankruptcy Code to assume or reject leases and executory
11 contracts). A debtor may not assume (or assume and assign) a lease or executory contract on any
12 different terms than exist on the petition date, without the express agreement of the non-debtor
13 party to the contract or lease. *See e.g.* *N.L.R.B. v. Bildisco and Bildisco*, 465 U.S. at 531; *see*
14 *also, In re National Gypsum Co.*, 208 F.3d at 506.

15 12. To the extent Debtor seeks to assume or assumed assign less than the entire Master
16 Lease, including all equipment schedules thereto, such cherry-picking is not permitted under
17 section 365 of the Bankruptcy Code. Debtor must assume (or assume and assign) or reject the
18 entire Master Lease, including all equipment schedules thereto and the Leased Equipment
19 thereunder, in its entirety, *cum onere*.

20 13. Accordingly, any proposed assumption or assumption and assignment of the
21 Master Lease by Debtor that attempts or purports to exclude any portion thereof or equipment
22 schedule thereto must be denied.

23 **B. Because the Cure Notice Incorrectly Specifies the Defaults That Must be
24 Cured Before the Master Lease May be Assumed or Assigned and Assigned
25 Pursuant to 11 U.S.C. § 365(b), the Court May Not Approve the Assumption
26 or Assumption and Assignment of the Master Lease.**

27 14. As of the date hereof, monetary defaults exists under the Master Lease. *See Wall*
28 Declaration, ¶ 10. Without giving effect to the prepetition acceleration of all amounts under the
Master Lease, the known, existing monetary defaults and obligations due and delinquent as of the

1 date hereof are \$177,444.85, which consists of

2 (a) \$11,684.28 under the 9892489 Schedule, on account of (i) rents in the amount
3 of \$10,260.64, (ii) late fees in the amount of \$577.08, and (iii) sales taxes on rents in the
4 amount of \$846.56;

5 (b) \$64,738.03 under the 9892228 Schedule, on account of (i) rents in the amount
6 of \$54,392.28, (ii) late fees in the amount of \$3,229.61, (iii) sales taxes on rents and
7 property taxes in the amount of \$4,687.70, and (iv) property taxes in the amount of
8 \$2,428.44;

9 (c) \$54,969.75 under the 9892587 Schedule, on account of (i) rents in the amount
10 of \$48,443.54, (ii) late fees in the amount of \$2,279.68, (iii) sales taxes on rents in the
11 amount of \$3,996.53, and (iv) document fees in the amount of \$250.00; and

12 (d) \$46,052.79 under the 9899485 Schedule, on account of (i) rents in the amount
13 of \$40,555.39, (ii) late fees in the amount of \$1,901.60, (iii) sales taxes on rents in the
14 amount of \$3,345.80, and (iv) document fees in the amount of \$250.00.¹ *Id.* at ¶ 11.

15 Additionally, rent and other monetary obligations will become due and owing pursuant to the
16 Master Lease from and after the date hereof (but for the acceleration) and must be paid by Debtor
17 when due or paid in connection with any assumption or assumption and assignment of the Master
18 Lease. *Id.* The cure obligation under section 365(b)(1) of the Bankruptcy Code mandates that an
19 assumption or assumption and assignment of the Master Lease be barred unless all rent, charges,
20 fines and other monetary obligations that become due pursuant to the Master Lease from and after
21 the date hereof (a) are paid when due, or (b) are paid in full in connection with an assumption or
22 assumption and assignment of the Master Lease.

23 15. Further, additional monetary obligations may have accrued pursuant to Master
24 Lease but have not yet become the subject of an invoice or statement and may not become due
25 prior to the entry of an order approving the assumption or assumption and assignment of the

27 ¹ By identifying and asserting only the regular, periodic installments and charges that have come
28 due and remain unpaid, but for the acceleration, GE HFS does not waive its right to seek or
collect the full accelerated amount due and owing to GE HFS to the extent permitted by the
Bankruptcy Code.

1 Master Lease. *See* Wall Declaration, ¶ 12 and Ex. A., p. 1, § 5. A non-exclusive example of such
2 accrued, but not yet due, obligations are personal property taxes, which must be paid by Debtor
3 pursuant to the Master Lease. Wall Declaration, ¶ 12. Debtor, and any proposed assignee, must
4 acknowledge, and any order approving cure amounts and the assumption or assumption and
5 assignment of the Master Lease must provide, that Debtor or any proposed assignee shall be
6 liable for all amounts that have accrued but have not become the subject of a statement or other
7 invoice prior to the date hereof without regard to whether such amounts are attributable to a pre-
8 petition or post-petition period. GE HFS objects to any assignment or assignment and
9 assumption of the Master Lease to the extent that the order approving any such assumption or
10 assumption and assignment of the Master Lease does not obligate Debtor or any assignee to pay
11 all obligations that have accrued under the Master Lease but have not yet become due and
12 payable prior to the date an order is entered approving the assumption of the Master Lease as and
13 when the same come due.

14 16. In the absence of any definitive agreement in writing to the contrary between GE
15 HFS and Debtor, GE HFS additionally asserts its right pursuant to section 365(b)(1)(B) of the
16 Bankruptcy Code to be reimbursed as part of the cure payments for all of its actual pecuniary
17 losses including, but not limited to, reasonable attorneys' fees and costs expended with regard to
18 Debtor's bankruptcy proceedings. *See* Wall Declaration, ¶ 13 and Ex. A., p. 3, § 10(d). GE HFS
19 objects to assumption of the Master Lease to the extent that all cure amounts are not immediately
20 paid in full in advance of any assumption of the Master Lease, including all of its actual
21 pecuniary losses including, but not limited to, reasonable attorneys' fees and costs expended with
22 regard to Debtor's bankruptcy proceedings.

23 17. The Master Lease also provides that Debtor must indemnify and hold GE HFS
24 harmless with regard to any and all claims suffered by the GE HFS and arising from Debtor's use
25 and possession of the Leased Equipment. *See* Wall Declaration, ¶ 14 and Ex. A., p. 3, § 11.
26 Debtor and any assignee of the Master Lease must assume all indemnification liabilities set forth
27 in the Master Lease and Debtor must be required to evidence, or obtain, adequate insurance in
28 order to guaranty that its indemnity responsibilities will be met. Claims for indemnity may

1 include, but are not limited to, claims for personal injuries which occur in connection with the
2 Leased Equipment where Debtor or GE HFS is joined as a party defendant, damage and
3 destruction to the Leased Equipment by Debtor or its agents, or claims for environmental damage
4 or environmental cleanup. GE HFS objects to any assumption or assumption and assignment of
5 the Master Lease to the extent that it does not obligate Debtor or any assignee of the Master Lease
6 to be responsible for all indemnification liabilities or obligate Debtor to otherwise provide
7 assurance that such indemnification obligations will be satisfied.

8 18. Because Debtor has failed to demonstrate that any assumption and assignment of
9 the Master Lease will fully comply with all of the requirements of section 365(b) of the
10 Bankruptcy Code, including, but not limited to, a cure of all defaults, the Master Lease cannot be
11 assumed and GE HFS objects to any assumption or assumption and assignment of the Master
12 Lease.

13 **C. Reservation of Rights.**

14 19. Nothing herein shall otherwise limit GE HFS's right to file a proof of claim or
15 amend an existing filed proof of claim in the above-titled case for any pre-petition amounts
16 outstanding or additional post-petition amounts that accrue under the Master Lease or any
17 damages arising from the rejection of the Master Lease, or otherwise waive, limit, or prejudice
18 GE HFS's valid prepetition exercise of its remedies in connection with the acceleration of all
19 amounts under the Master Lease or the collection thereof.

20 **WHEREFORE**, for the reasons set forth above, GE HFS respectfully requests that the
21 Court:

22 A. Deny assumption or assumption and assignment of the Master Lease unless
23 (1) all rent, charges, fines and other monetary obligations that become due pursuant to the
24 Master Lease from and after the date hereof are paid when due, or are paid in full in
25 connection with an assumption or assumption and assignment of the Master Lease, (2) any
26 order approving cure amounts and the assumption or assumption and assignment of the
27 Master Lease provides that Debtor or any proposed assignee shall be liable for all amounts
28

1 under or pursuant to the Master Lease that have accrued but have not become the subject
2 of a statement or other invoice prior to the date hereof without regard to whether such
3 amounts are attributable to a pre-petition or post-petition period, (3) all of GE HFS's
4 actual pecuniary losses including, but not limited to, reasonable attorneys' fees and costs
5 expended with regard to Debtor's bankruptcy proceedings, are immediately paid in full as
6 cure amounts, in advance of any assumption of the Master Lease, and (4) any order
7 approving the assumption or assumption and assignment of the Master Lease provide that
8 Debtor or any assignee of the Master Lease are responsible for all indemnification
9 liabilities or obligate Debtor to otherwise provide assurance that such indemnification
10 obligations will be satisfied; and

11 B. Grant such other and further relief as may be just and required under all of
12 the circumstances.

13 Dated: August 1, 2018.

14 KUTAK ROCK LLP

15 By:/s/ *Lisa M. Peters*
16 LISA M. PETERS

17 18 19 Attorneys for Creditor GE HFS, LLC